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SUPREME COURT, U.S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1954

No. ~~218~~ 4

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY, PETITIONERS,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 15, 1954
CERTIORARI GRANTED OCTOBER 14, 1954

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COMPLAINT

(Number and Title Omitted)

Filed: August 8, 1952

The petition of the INDIAN TOWING COMPANY, INC., the UPPER MISSISSIPPI TOWING CORPORATION, the MINNESOTA FARM BUREAU SERVICE COMPANY and the UNITED FIREMEN'S INSURANCE COMPANY, with respect represents:

I.

The INDIAN TOWING COMPANY, INC. is a corporation organized and existing under the laws of the State of Louisiana, with its principal place of business in the City of New Orleans; the UPPER MISSISSIPPI TOWING CORPORATION is a corporation duly organized and existing under the laws of the State of Minnesota and a resident of Minneapolis; the MINNESOTA FARM BUREAU SERVICE COMPANY is a corporation organized and existing under the laws of Minnesota with its domicile in St. Paul; and the UNITED FIREMEN'S INSURANCE COMPANY is a corporation organized and existing under the laws of the State of New York, with its principal place of business in the City of New York.

II.

This cause of action sounds in tort and is brought under Section 1346(b), Title 28 of the United States Code.

III.

That on or about October 1, 1951 the Tug "NAVAJO", owned by the INDIAN TOWING COMPANY, INC., was towing BARGE AS-16, chartered by the UPPER MISSISSIPPI TOWING CORPORATION from the Alexander Shipyards, Inc.; that aboard the said Barge was 1,204.25 tons of triple super phosphate, consigned to the MINNESOTA FARM BUREAU SERVICE COMPANY of St. Paul, Minnesota, and insured under a policy of insurance issued by the UNITED FIREMEN'S INSURANCE COMPANY.

IV.

On or about October 1, 1951 the said Tug "NAVAJO" went aground on Chandeleur Island, and as a result thereof the sea water gained entrance into the cargo space, completely wetting the cargo and damaging said cargo to the extent of SIXTY-TWO THOUSAND SIX HUNDRED FIFTY-NINE & 70/100 ($62,659.70) DOLLARS.

V.

The consignee refused to accept the cargo, and as a result the INDIAN TOWING COMPANY, INC. and the UPPER MISSISSIPPI TOWING CORPORATION, charterers of the BARGE AS-16, became responsible for the loss of the said cargo, and the said loss was paid by the plaintiff, UNITED FIREMEN'S INSURANCE COMPANY under loan receipts.

VI.

The grounding of said Tug "NAVAJO" was due solely to the failure of the light on Chandeleur Island.

VII.

The failure of the said light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation", and to the officers of the Coast Guard Cutter SALVIA who failed to properly check said light which works on a sun relay system; that they failed to check the battery and the sun relay system which causes the light to go on, and it is alleged, upon information and belief, that there was a loose connection which could have been discovered upon proper inspection; that the said officers and other personnel of the Coast Guard on duty in this area had also failed to properly check the light and to make any attempt to repair same with due diligence or to notify mariners using the light for navigation purposes.

VIII.

The said Chief Petty Officer Stone did not, when he checked the lighthouse on September 7, 1951, properly check the connections which were out in the weather; no attempt was made to check the light to see whether it was operating properly between September 7 and October 1, 1951; that, therefore, the said grounding was due solely to the negligence of the Coast Guard in the maintenance and servicing of said light, and its failure to properly maintain

the light or to notify vessels that the said light was not functioning.

IX.

As averred, your petitioners have suffered damage through the loss of cargo due to the grounding of the said BARGE AS-16 in the sum of SIXTY-TWO THOUSAND SIX HUNDRED FIFTY-NINE & 70/100 ($62,659.70) DOLLARS.

WHEREFORE, petitioners pray for judgment in the sum of SIXTY-TWO THOUSAND SIX HUNDRED FIFTY-NINE & 70/100 ($62,659.70) DOLLARS against the UNITED STATES OF AMERICA, with interest and costs.

(Sgd.) RICHARD J. MONTGOMERY,
RICHARD B. MONTGOMERY, JR.
1105 Maritime Building
New Orleans 12, Louisiana

ATTORNEYS FOR PETITIONERS

MOTION TO TRANSFER CASE TO EASTERN DISTRICT OF LOUISIANA

(Number and Title Omitted)

Filed: September 4, 1952

Comes the United States of America, by Joseph E. Brown, United States Attorney for the Southern District of Missis-

sippi, and moves the Court to transfer this action to the Southern District of Louisiana, New Orleans Division, for the reason that none of the plaintiffs reside in the Southern District of Mississippi and one of the plaintiffs, Indian Towing Company, resides in the Eastern District of Louisiana, and the alleged act or omission complained of occurred on Chandeleur Island in the Eastern District of Louisiana, New Orleans Division. Further, counsel for all of plaintiffs reside in New Orleans. Under Section 1402(b) the venue of this action is not in the Southern District of Mississippi, but in the Eastern District of Louisiana, New Orleans Division, and inasmuch as the venue is there and counsel for all of the plaintiffs reside in New Orleans, this action for the convenience of the parties and witnesses and in the interest of justice should be transferred to the Eastern District of Louisiana, New Orleans Division.

(Sgd.) JOSEPH E. BROWN
JOSEPH E. BROWN
United States Attorney

CERTIFICATE

I, JOSEPH E. BROWN, United States Attorney for the Southern District of Mississippi, certify that I have this day mailed through United States mail, postage prepaid, a copy of the foregoing Motion to Messrs. Montgomery, Barnett, Brown & Sessions, counsel for plaintiffs, whose address is 1103-6 Maritime Building, New Orleans 12, Louisiana, and now give notice to them that the Motion will be presented for hearing to the District Judge in the Court Room

of the United States District Court, 4th Floor, Post Office Building, Jackson, Mississippi at 10:00 o'clock A.M., Thursday, September 11, 1952, or as soon thereafter as it can be heard.

This, September 4, 1952.

(Sgd.) JOSEPH E. BROWN
United States Attorney

ORDER GRANTING TRANSFER OF CASE

(Number and Title Omitted)

Upon motion and suggestion of the United States of America that this cause be transferred to the Eastern District of Louisiana, New Orleans Division, and it appearing to the Court that none of the plaintiffs reside in the Southern District of Mississippi, and that one of the plaintiffs, Indian Towing Company, Inc., resides in the Eastern District of Louisiana, and that the alleged negligent act or omission complained of occurred in the Eastern District of Louisiana, New Orleans Division, this action, for the convenience of the parties and in the interest of Justice, the complainants consenting thereto, is transferred to the Eastern District of Louisiana, New Orleans Division, wherein it might have been originally brought.

The Clerk of this Court is directed to forthwith transmit the file with a copy of this order, to the Clerk of the United States District Court for the Eastern District of Louisiana,

New Orleans Division, at New Orleans, Louisiana.

So ordered this 15th day of September 1952.

S. C. MIZE
UNITED STATES DISTRICT
JUDGE

A TRUE COPY I HEREBY CERTIFY.
B. L. Todd, Jr. Clerk.
(Sgd.) By A. I. HERBERT

(SEAL)

MOTION TO DISMISS AND REASONS IN SUPPORT THEREOF

(Number and Title Omitted)

Filed: December 1, 1952

On motion of the United States of America, defendant, appearing herein through its attorney, Lansing L. Mitchell, Assistant United States Attorney for the Eastern District of Louisiana, and on suggesting to the Court that defendant is entitled to have this suit dismissed and hereby so moves for the following reasons:

(1) The defendant is a corporation sovereign whose consent must be granted before suits of this nature and character can be commenced against,

and that defendant has not consented to be sued in the manner in which this suit is brought in that the damages allegedly sustained by the complainant are of a maritime nature and complainant seeks recovery in a civil action. Defendant has consented to be sued for certain types of maritime torts under the provisions of the Suits in Admiralty Act (46 U.S.C. 741) or the Public Vessels Act (46 U.S.C. 787) and complainant can only find relief from maritime loss under the provisions of the above mentioned statutes.

(Sgd.) LANSING L. MITCHELL
LANSING L. MITCHELL
Assistant United States Attorney
239 Post Office Building
New Orleans, Louisiana

Attorney for Defendant

HEARING ON MOTION TO DISMISS & SUBMISSION

MINUTE ENTRY

January 14th, 1953

Christenberry, J:

(Number and Title Omitted)

This cause came on this day to be heard on motion of defendant to dismiss;

Present:
Lansing L. Mitchell,
Asst. U. S. Attorney;

Richard B. Montgomery, Jr.:
Attorney for plaintiffs;

After hearing argument of counsel for the respective parties, the matter was submitted and the court took time to consider. Counsel for defendant to have 20 days to file brief and counsel for plaintiff to have 10 days thereafter to file reply brief.

ORDER GRANTING MOTION TO DISMISS & DISMISSING SUIT

MINUTE ENTRY

June 29th, 1953

Christenberry, J:

(Number and Title Omitted)

This cause came on to be heard on a former date on the motion of the United States of America to dismiss, and was argued by counsel for the respective parties and submitted when the Court took time to consider;

Now therefore, after due consideration thereof;

IT IS ORDERED that the motion of the United States of America to dismiss is GRANTED, and the suit is hereby dismissed.

(Sgd.) H.W.C.

Elizabeth H. Dalehite, Henry G. Dalehite, Jr. et al.
vs.
United States of America,
U. S. Sup. Ct.,
June 8, 1953.

NOTICE OF APPEAL

(Number and Title Omitted)

Filed: August 20, 1953

Notice is hereby given that the Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company, appeal to the Circuit Court of Appeals for the Fifth Circuit from the order rendered on June 29th, 1953 dismissing the above entitled and numbered suit and from the final judgment dismissing the said suit on July 1, 1953.

(Sgd.) RICHARD B. MONTGOMERY
Richard B. Montgomery, Jr.
Attorney for Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company, and United Firemen's Insurance Company

1105 Maritime Building
New Orleans, Louisiana

BOND ON APPEAL

(Number and Title Omitted)

Filed: August 20, 1953

KNOW ALL MEN BY THESE PRESENTS:

That we, Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company, as principals, and Phoenix Indemnity Company, as surety, are held and firmly bound to the United States of America in the full and just sum of Two Hundred and Fifty Dollars ($250.00) to be paid to the United States of America, or its assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Signed with our seals and dated this 19th day of August, in the year of Our Lord, One Thousand, Nine Hundred and Fifty-three.

WHEREAS, lately a final judgment in the suit pending in the said court as above entitled was rendered against the said plaintiffs Indian Towing Company, Inc., Upper Mississippi, Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company, and the said plaintiffs having given notice of appeal and filed a copy thereof in the clerk's office in the aforesaid suit and having served opposing counsel with notice of said appeal;

NOW THE CONDITION OF THE OBLIGATION IS SUCH, That if the said plaintiffs Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company shall prosecute their appeal to the Court of Appeal of the Fifth Circuit to final effect and answer all damages and costs if they fail to make the said appeal good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and Delivered in presence of

_____

Indian Towing Company, Inc.
Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company
Principals

_____

(Sgd.) RICHARD B. MONTGOMERY
Richard B. Montgomery, Jr.
Attorney

PHOENIX INDEMNITY COMPANY
Surety

(Sgd.) By ROBERT W. BREEDEN, JR.
ATTORNEY-IN-FACT

(SEAL)

NOTICE OF APPEAL

(Number and Title Omitted)

Filed: August 24, 1953

Notice is hereby given that the Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company and United Firemen's Insurance Company, appeal to the U. S. Circuit Court of Appeals for the Fifth Circuit from the order rendered on June 29th, 1953, dismissing the above entitled and numbered suit and from the final judgment dismissing the said suit on July 1, 1953.

(Sgd.) RICHARD B. MONTGOMERY
Richard B. Montgomery, Jr.
Attorney for Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company, and United Firemen's Insurance Company

1105 Maritime Building
New Orleans, Louisiana

DESIGNATION OF TRANSCRIPT

(Number and Title Omitted)

Filed: August 24, 1953

Now into court come the plaintiffs in this case and request that the entire record, with the exception of the proof of service, be included in the transcript.

(Sgd.) RICHARD B. MONTGOMERY
Richard B. Montgomery, Jr.
Attorney for Indian Towing Company, Inc., Upper Mississippi Towing Corporation, Minnesota Farm Bureau Service Company, and United Firemen's Insurance Company

1105 Maritime Building
New Orleans, Louisiana

CLERK'S CERTIFICATE

I, A. Dallam O'Brien, Jr., Clerk of the United States District Court for the Eastern District of Louisiana, do hereby certify the foregoing 16 pages to contain a true and correct copy of the record in the case of "Indian Towing Company, Inc. -vs- United States of America" No. 3667 of the Civil Action docket of this court as made up in accordance with the Designation of Contents copied herein.

Witness my hand and the seal of said Court at the City of New Orleans, Louisiana this 16th day of September, 1953

A. DALLAM O'BRIEN, JR.,
Clerk

By: (Sgd.) ANDREW J. BACON
Deputy Clerk

MINUTE ENTRY ON ARGUMENT AND SUBMISSION—April 1 1954

[Omitted in printing]

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 14747

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY, Appellants

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Eastern District of Louisiana

OPINION—April 22, 1954

Before HUTCHESON, Chief Judge, and HOLMES and BORAH, Circuit Judges.

PER CURIAM: Brought under the Federal Tort Claims Act, Sec. 1346(b) Title 28, U.S.C., the suit was for cargo damage from the wetting of the cargo of the Barge AS-16, while in tow of the tug "Navajo," as a result of the grounding of the tug on Chandeleur Island on or about October 1, 1951, "due solely to the failure of the light on the island."

The claim was that the failure of the light was due to the negligence of Chief Petty Officer Stone and other officers and members of the Coast Guard in charge of "aids to navigation" in failing to properly check the light to see whether it was operating properly between September 7th and October 1st, and that the grounding of the tug was due to the negligence of the Coast Guard in maintaining and servicing the light and in not notifying vessels that it was not functioning.

The United States filing a motion to dismiss, the motion was sustained on the authority of *Dalehite v. U. S.*, 346 U. S. 15.

Appealing from the order, appellants are here insisting that the facts alleged as ground for recovery here do not bring the case within the facts of, or the reasons for, the decision in the Delehite case while appellee as vigorously insists that that decision and the decision in the Feres case[1] are controlling here.

We are of the clear opinion that this is so, and that, under the principles, governing the liability of the United States under the invoked act laid down in those cases, the judgment must be affirmed.

Affirmed.

IN UNITED STATES COURT OF APPEALS

No. 14747

INDIAN TOWING COMPANY, INC., UPPER MISSISSIPPI TOWING CORPORATION, MINNESOTA FARM BUREAU SERVICE COMPANY, UNITED FIREMEN'S INSURANCE COMPANY

versus

UNITED STATES OF AMERICA

JUDGMENT—April 22, 1954

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

Clerk's Certificate to foregoing transcript omitted in printing.

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[1] Feres v. United States, 340 U. S. 135.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1954

No. 213

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed October 14, 1954

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.